

# **Tentative Rulings for October 19, 2020**

## **Department 3**

**To request oral argument, you must notify Judicial Secretary  
Vanessa Siojo at (760) 904-5722  
and inform all other counsel no later than 4:30 p.m.**

This court follows California Rules of Court, Rule 3.1308 (a) (1) for tentative rulings (see Riverside Superior Court Local Rule 3316). Tentative Rulings for each law & motion matter are posted on the Internet by 3:00 p.m. on the court day immediately before the hearing at <https://www.riverside.courts.ca.gov/OnlineServices/TentativeRulings/tentative-rulings.php>. If you do not have Internet access, you may obtain the tentative ruling by telephone at (760) 904-5722.

To request oral argument, no later than 4:30 p.m. on the court day before the hearing you must (1) notify the judicial secretary for Department 3 at (760) 904-5722 and (2) inform all other parties of the request and of their need to appear telephonically, as stated below. If no request for oral argument is made by 4:30 p.m., the tentative ruling **will become the final ruling** on the matter effective the date of the hearing. **UNLESS OTHERWISE NOTED, THE PREVAILING PARTY IS TO GIVE NOTICE OF THE RULING.**

**IN LIGHT OF THE CORONAVIRUS PANDEMIC; AND UNTIL FURTHER NOTICE, COUNSEL AND SELF-REPRESENTED PARTIES MUST APPEAR AT ANY LAW AND MOTION DEPARTMENT TELEPHONICALLY WHEN REQUESTING ORAL ARGUMENTS. IN-PERSON APPEARANCES WILL NOT BE PERMITTED.**

**TELEPHONIC APPEARANCES:** On the day of the hearing, call into one of the below listed phone numbers, and input the meeting number (followed by #):

- Call-in Numbers: 1 (213) 306-3065 or 1 (844) 621-3956 (TOLL FREE)
- Meeting Number: **805-993-102#**
- Press **#** again

Please **MUTE** your phone until your case is called and it is your turn to speak. It is important to note that you must call fifteen (15) minutes prior to the scheduled hearing time to check in or there may be a delay in your case being heard.

For additional information and instructions on telephonic appearances, visit the court's website at <https://riverside.courts.ca.gov/PublicNotices/Webex-Appearances-Public-Access.pdf?rev=05-29-2020-09:54:48am>.

1.

RIC1903933	ARELLANO VS PHH MORTGAGE CORPORATION	DEMURRER TO 2ND AMENDED COMPLAINT OF MAGDAI ARELLANO BY PHH MORTGAGE CORPORATION, U.S. BANK NATIONAL ASSOCIATION
RIC1903933	ARELLANO VS PHH MORTGAGE CORPORATION	MOTION TO/FOR STRIKE PORTIONS OF PLAINTIFFS SECOND AMENDED COMPLAINT BY PHH MORTGAGE CORPORATION, U.S. BANK NATIONAL ASSOCIATION

**Tentative Ruling:**

The Court overrules the demurrer to the 1st, 2nd and 6th causes of action.

The Court sustains the demurrer without leave to amend as to the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> causes of action.

The Court grants the motion to strike without leave to amend.

Defendants are ordered to file an answer within 30 days.

**FACTUAL / PROCEDURAL CONTEXT**

Plaintiff Magdai Vences Arellano owns real property in Hemet, subject to a deed of trust. Defendant U.S. Bank is the current beneficiary, and Defendant PHH Mortgage Corporation is the current servicer. On 6/27/18, a notice of default was recorded and on 12/28/18, a notice of trustee's sale was recorded with a sale date of 7/31/19. On 7/3/19, Plaintiff submitted a complete loan modification application, but continued with their foreclosure efforts. She alleges that on 1/30/20, her application was denied and she appealed on 1/30/20.

Plaintiff filed this action on 7/23/19. After the court sustained Defendants' demurrer, Plaintiff filed the First Amended Complaint (FAC) on 3/10/20. The court again sustained Defendant's demurrer, and Plaintiff filed the Second Amended Complaint (SAC) on 8/14/20. The SAC asserts: (1) violation of Civil Code §2923.6(c); (2) violation of Civil Code §2923.7; (3) violation of Civil Code §2924.9; (4) violation of Civil Code §2924.10; (5) negligence; and (6) unfair business practices.

Defendants demur to each cause of action on the grounds that they fail to state facts sufficient. For the 1st cause of action (Civil Code §2923.6), they assert that there are no new facts demonstrating a change of circumstances, the statute only prohibits recording new documents and does not require rescinding documents, and that Plaintiff's loan application was incomplete. For the 2nd cause of action (Civil Code §2923.7), Plaintiff provides no facts. For the 3rd cause of action (Civil Code §2924.9, they argue it only applies to the loan servicer, and fails to provide facts of a material violation, particularly where there were two prior modifications. For the 4th cause of action (Civil Code §2924.10), there are no facts of a violation as the only allegation relates to an appeal. For the 5th cause of action (negligence), they argue that there is no duty, causation or damages. For the 6th cause of action (UCL), it is dependent on the other claims and she lacks standing. Defendants also move to strike requests for damages under HBOR as they are not available pre-foreclosure, and they are not available under UCL.

In opposition, Plaintiff repeats her allegations and contends each is properly pled. For the strike, she argues that the motion to strike is disfavored and Defendants will not suffer prejudice.

**ANALYSIS**

***Request for Judicial Notice***

Defendants request judicial notice of the following documents, which the Court grants:

- Deed of Trust recorded 3/20/06, naming BNC Mortgage as lender, MERS as beneficiary and T.D. Service Company as trustee.
- Assignment of Deed of Trust recorded 9/19/12 transferring interest from MERS to U.S. Bank National Association as trustee of Structured Asset Securities Corporation Mortgage Pass-Through Certificates.
- Corporate Assignment of Deed of Trust recorded 10/17/16 transferring interest from MERS to same U.S. Bank.
- Notice of Default recorded 11/13/06 by Executive Trustee Services, LLC as agent for beneficiary.
- Fixed Rate Modification Agreement recorded 5/13/09 between Plaintiff and GMAC Mortgage.
- Notice of Rescission of Notice of Default recorded 11/7/08 by Executive Trustee Services.
- Non-HAMP Interest Only Step Rate Loan Modification Agreement recorded 3/22/13 between Plaintiff and GMAC.
- Substitution of Trustee recorded 11/2/16 by U.S. Bank naming Western Progressive as trustee.
- Notice of Default recorded 6/27/18 by Western Progressive.
- Notice of Trustee's Sale recorded 12/28/18 by Western Progressive.
- U.S. Bankruptcy Court docket for Plaintiff, indicating she filed for Ch. 13 bankruptcy on 6/18/19 and dismissed on 7/10/19.

### **1st Cause of Action - Civil Code §2923.6**

Section 2923.6(c) provides that if a borrower submits a complete application for a first lien modification at least five business days before a scheduled foreclosure sale, the sale shall not go forward or record documents while the application is pending. Plaintiff alleges she submitted her loan application on 7/3/19. (SAC ¶16.) She then contends it was denied on 1/3/20 and she appealed it on 1/30/20. (SAC ¶17-18.) She complains that Defendants failed to rescind all foreclosure documents, including the notice of default and notice of trustee's sale. (SAC ¶30.) However, she fails to provide any authority that they were required to rescind these documents. The notice of default and notice of trustee's sale were recorded on 6/27/18 and 12/28/18 (RJN, Ex. 9-10), before she even applied for a loan modification. In contrast to the last time, she now alleges that on 3/17/20, Defendants recorded a notice of trustee's sale. (SAC ¶31, Ex. I.) Defendants do not address this new allegation that the foreclosure is still going forward.

Instead, Defendants focus on two other actions—that there was no material change to her financial circumstances and that the application itself was incomplete. Defendants misstate the law and allegations. Civil Code §2923.6(g) requires a material change in the borrower's financial circumstances where there are multiple applications for first lien loan modifications. Plaintiff only alleges she submitted one application, which was denied and which she appealed. (SAC ¶16-20.) There are not multiple applications.

Defendants then argue that the application is incomplete. "While the 'allegations [of a complaint] must be accepted as true for purposes of demurrer,' the 'facts appearing in exhibits attached to the complaint will also be accepted as true and, if contrary to the allegations in the pleading, will be given precedence. [Citation.]" (*Brakke v. Economic Concepts, Inc.* (2013) 213 Cal.App.4th 761, 767.) However, "If the exhibits are ambiguous but can be construed as the plaintiffs or petitioners suggest, then we must accept their construction." (*Requa v. Regents of*

*University of California* (2012) 213 Cal.App.4th 213, 224.) The question is whether the application is incomplete. (SAC Ex. C.) “An application shall be deemed ‘complete’ when a borrower has supplied the mortgage servicer with all documents required by the mortgage servicer within the reasonable timeframes specified by the mortgage servicer.” (Civil Code §2923.6(h).) It is not clear what Defendants required for a complete application as it is not even Defendants’ form. Nevertheless, for pleading purposes Plaintiff has sufficiently alleged a violation.

As such, this cause of action is overruled.

### **2nd Cause of Action – Civil Code §2923.7**

Section 2923.7(a) requires the mortgage servicer to appoint a single point of contact upon request from a borrower who requests a foreclosure prevention alternative. A single point of contact is an individual or team of personnel. (Civil Code §2923.7(e).) A material violation entitles a borrower to bring an action for injunctive relief. (Civil Code §2924.12.) Here, Plaintiff pleads that there were multiple individuals that gave her misleading information, never identified themselves as points of contact, never provided useful indication that her loan was under review, or assist in providing a loan modification. (SAC ¶¶43-44.) The fact that they did not identify as contacts is irrelevant. The issue is whether they complied with section 2923.7(b) in the following manners: (1) communicating the process by which a borrower may apply for foreclosure prevention alternatives and their deadlines; (2) coordinating receipt of all documents and notifying the borrower of missing documents; (3) having access to current information to timely, accurately and adequately inform the borrower of the current status of the foreclosure prevention alternative; (4) ensuring that the borrower is considered for foreclosure prevention alternatives, if any; and (5) having access to individuals with the ability and authority to stop foreclosure proceedings when necessary. Here, Plaintiff alleges that she was not given sufficient updates. (SAC ¶¶42.) The court overrules the demurrer to this cause of action.

### **3rd Cause of Action – Civil Code §2924.9**

Civil Code §2924.9 provides that unless a borrower has previously exhausted the first lien loan modification process, the servicer shall send notice with required information about foreclosure prevention alternatives within five business days after recording a notice of default. Again, a material violation permits injunctive relief prior to the sale. (Civil Code §2924.12.)

Plaintiff fails to describe any facts of a material violation. Plaintiff obtained two loan modifications, one in 2009 and another in 2013. (RJN, Ex. 5, 7.) Furthermore, the notice of default was recorded in 2018 and Plaintiff pled that she applied for a loan modification in 2019. (SAC ¶¶50-51.) As Plaintiff was able to get through the process, she fails to identify any material violation. In opposition, she argues she lost the opportunity for a loan modification, but there is no authority for the proposition that a borrower is entitled to one. There is no duty to agree to a loan modification. (*Hamilton v. Greenshich Investors XXVI, LLC* (2011) 195 Cal.App.4th 1602, 1617 (applying Civil Code §2923.6).) The court sustains the demurrer as to this cause of action without leave to amend.

### **4th Cause of Action – Civil Code §2924.10**

Civil Code §2924.10 requires a servicer to acknowledge receipt of the loan modification within 5 business days of receipt. Again, the remedy is an injunction for a material violation. (Civil Code §2924.12.) The claim is based on the failure to provide written notice within 5 business days of her resubmitted loan modification. (SAC ¶¶63.) However, it is clear that she was appealing the denial of her loan modification. (SAC ¶¶62.) There are no new facts demonstrating that this was a new application. Plaintiff again fails to identify any material violation that impacted her review process. The court sustains the demurrer as to this cause of action without leave to amend.

### **5th Cause of Action – Negligence**

“In order to state a cause of action for negligence, the complaint must allege facts sufficient to show a legal duty on the part of the defendant to use due care, a breach of such legal duty, and the breach as the proximate or legal cause of the resulting injury.” (*Bellah v. Greenson* (1978) 81 Cal.App.3d 614, 619.) As a general rule, a financial institution does not owe a duty of care to a borrower in its conventional role as a mere lender of money. (*Nymark v. Heart Fed. Savings & Loan Assn.* (1991) 231 Cal.App.3d 1089, 1096.) In order for a lender to be liable to a borrower, there must have been active participation in the “financed enterprise” that is “beyond the domain of the usual money lender.” (*Id.*) However, *Nymark* recognized the possibility of a duty involving looking at various factors (*Biakanja* factors), including (1) the extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm to him; (3) the degree of certainty that the plaintiff suffered injury, (4) the closeness of the connection between the defendant’s conduct and the injury suffered; (5) the moral blame; and (6) the policy of preventing future harm. (*Id.* at 1098.)

In *Alvarez v. BAC Home Loans Servicing, LP* (2014) 228 Cal.App.4th 941, 947-949, the court found that the lender owed a duty of care in reviewing applications for modification of the loans once they agreed to consider them. In using the *Biakanja* factors, the court found that the mishandling of the application caused the plaintiffs to lose their home as the lender failed to conduct a timely manner and relying on incorrect information. (*Id.* at 944-945, 951.) However, the plaintiffs also alleged that they were qualified to receive a loan modification, or had their application been timely reviewed, they would have sought relief elsewhere. (*Id.* at 951.) In *Lueras v. BAC Home Loans Servicing, LP* (2013) 221 Cal.App.4th 49, 56-58, the homeowners sued the lender after foreclosure when the lender was mismanaging the homeowners’ loan modification application. The court stated that a loan modification is a renegotiation of the loan terms and as such, did not go outside the scope of the conventional role as a lender of money. (*Id.* at 67.) What the court did note was that the lender owes a duty to not make a material misrepresentation about the status of the loan modification. (*Id.* at 68-69.) In contrast, in the recent case of *Sheen v. Wells Fargo Bank* (2019) 38 Cal.App.5th 346, 352-353 (review granted 11/13/19), the court held that a lender does not owe a borrower a tort duty of care during a loan modification negotiation.

The problem here is that Plaintiff has only alleged a breach based on the HBOR claims and processing her loan modification application. (SAC ¶¶71-73.) The Court does not find that by basing her claims on HBOR statutes, which would essentially turn injunctive relief statutes into negligence per se claims for damages, that these allegations go to the scope of a lender. The real issue is Plaintiff alleges that they made negligent misrepresentations regarding the loan modification process. (SAC ¶74.) But she never identifies what the misrepresentations were. She contends her case is similar to *Alvarez*, but she does not state how Defendants mishandled her application. While she goes over the *Biakanja* factors in her pleading, duty is a legal question.

Here, Plaintiff has not lost her home yet and she was placed in foreclosure by her default prior to applying for the loan modification. She alleges that they never contacted her (SAC ¶94), but the fact remains that she submitted a loan modification application on 7/3/19, which was denied on 1/29/20. (SAC ¶¶16-17.) She does not allege that she was qualified for a loan modification. She does not allege that the loan modification process was mishandled—other than the possible dual tracking and lack of single point of contact.

The court sustains the demurrer as to this cause of action without leave to amend.

### **6th Cause of Action – UCL**

Business & Professions Code §17200 prohibits any business act or practice that is unlawful, unfair, or fraudulent. A cause of action for violating this statute “borrows” actionable conduct and makes it independently actionable under the unfair competition law. (*Smith v. State*

*Farm* (2001) 93 Cal.App.4th 700, 718.) Under Proposition 64, a party must establish an economic injury that was caused by the unfair business practice. (*Jenkins v. JP Morgan Chase Bank, N.A.* (2013) 216 Cal.App.4th 497, 522 (overturned on other grounds in *Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919).) While potentially losing a home due to foreclosure constitutes an economic injury, it is not sufficient if the borrower's default on the loan triggered the foreclosure. (*Id.* at 522-523.) Plaintiff has not alleged economic injury. She merely alleges that she spent hours and resources providing updated financial documents, while losing income, and incurred penalties and higher arrears. However, under Civil Code §2924.11(f), a servicer may not collect late fees while a loan modification application or appeal is under consideration. The allegation that they were charging penalties is, in the Court's view, sufficient for pleading purposes.

The Court thus overrules the demurrer as to this cause of action.

### **Motion to Strike**

A motion to strike may be applied to any irrelevant, false or improper matter, or any pleading not drawn or filed in conformity with the laws of the state, court rule, or court order. (CCP §436.) A motion to strike is appropriate to attack improper damages. (Weil & Brown, *California Practice Guide: Civil Procedure Before Trial* §7:182 (Rutter Group 2020).) Civil Code §2924.12 provides injunctive relief before a trustee's sale for a violation of HBOR.

Here, Defendant is correct that Plaintiff is not entitled to damages as a result. For UCL, the only remedies available are injunctive relief and restitution—not damages. (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1144.)

The court thus grants the motion to strike without leave to amend.

2.

RIC2001701	COUNTY OF RIVERSIDE VS STEPHENSON	MOTION TO/FOR PRELIMINARY INJUNCTION BY COUNTY OF RIVERSIDE
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### **Tentative Ruling:**

On its own motion, the Court shall continue this motion for preliminary injunction until December 1, 2020, at 8:30 am in Dept 3, to be heard telephonically. Although this motion is unopposed, the Court finds that the County's evidence, principally the declaration of Supervising Code Enforcement Officer Marr Christian, is stale. The last time this witness observed the Subject Property was April 20, 2020, nearly five months prior to the filing of this motion. Without any current information, the Court cannot determine whether injunctive relief is appropriate.

The County may file a supplemental declaration as to the current state/condition of the Subject Property no later than November 9, 2020. Although the Court has received no opposition, the Defendants may file an opposition no later than November 20, 2020. The County may thereafter file a reply no later than November 25, 2020.

The County is ordered to give notice.

3.

RIC1715692	COUNTY OF RIVERSIDE VS CHRONIC PAIN RELIEF	MOTION RE APPROVAL OF SALE OF PROP/DIST OF FUNDS/FEEES
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### **Tentative Ruling:**

The Court orders the parties to appear.